

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 22, 2008

ANTONIO L. MCMURRY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Wilson County
Nos. 06-0162 and 07-0145 John D. Wootten, Jr., Judge

No. M2007-02488-CCA-R3-PC - October 1, 2008

The Petitioner, Antonio L. McMurry, appeals from the order of the Wilson County Criminal Court summarily dismissing his petition for post-conviction relief. He argues that the post-conviction court erred in its determination that the petition did not state a colorable claim. Following our review, we reverse the post-conviction court's order of summary dismissal. We remand for further proceedings.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Reversed; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Antonio L. McMurry, Nashville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Tom P. Thompson, District Attorney General; and Linda Walls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On July 16, 2007, the Defendant pled guilty in case number 06-0162 to one count of possession of more than .5 grams of cocaine with the intent to sell (a Class B felony), and in case number 07-0145, to one count of the sale of less than .5 grams of cocaine (a Class C felony). He was sentenced as a Range I standard offender to consecutive terms of eight years for the former and six years for the latter.

At his guilty plea submission hearing, the Petitioner acknowledged that, in exchange for his two guilty pleas, nine additional charges in different cases would be dismissed. The Petitioner also acknowledged that he understood the State would have had to prove him guilty beyond a reasonable doubt if he elected to have a jury trial, which was his right. Further, the Petitioner avowed that he

understood his rights, was entering his pleas voluntarily and of his own free will, and that no one had forced or coerced him in any manner to enter the pleas. Asked whether he was satisfied with his lawyer's services, the Petitioner responded that his defense lawyer (trial counsel) was "an excellent attorney" and that he had no complaints about his representation. The trial court then asked the Petitioner to explain why he was guilty of the offenses, and the Petitioner admitted that, in case number 06-0162, it was discovered during a traffic stop that he had 2.1 grams of drugs (cocaine) in his possession. Similarly, he admitted that, in case number 07-0145, he sold drugs to an undercover officer.

He did not file a direct appeal challenging his sentences, but he did file a timely petition for post-conviction relief challenging the validity of this guilty plea in case number 07-0145, the Class C felony cocaine sale offense for which he received a six-year sentence.

In his petition, the Petitioner alleged that he received the ineffective assistance of counsel prior to pleading guilty in that case and that the evidence against him was not sufficient to support his conviction. Specifically, the Petitioner contended that trial counsel was ineffective for the following reason:

Counsel was aware that no feild [sic] tests nor lab tests had been conducted on what was being alleged to be cocaine, however, I was coerced into taking a plea agreement without the State having ever proven the alleged drug, was in fact even a drug. I asked counsel to secure a test and or to obtain copies of any evidence that may have been in the State's possession that would have conclusively established the contents to be a drug, but, neither of said request [sic] were adheard [sic] to, thus in violation of [the] Sixth Amendment.

Similarly, he argued that the evidence was insufficient because the State did not establish that the substance he possessed was actually cocaine.

In a written order, the post-conviction court found that the Petitioner had admitted the substance was cocaine at his guilty plea submission hearing and summarily dismissed the Petitioner's petition. The Petitioner filed a timely notice of appeal.

ANALYSIS

On appeal, the Petitioner argues that the summary dismissal of his petition was error and repeats his assertion that trial counsel was ineffective in case number 07-0145 for failing to have tests conducted to determine whether the substance he sold was actually cocaine.¹ The State counters

¹ The pro se Petitioner also puts forth several new arguments in his lengthy appellate briefs. He asserts for the first time on appeal that his plea was involuntary because he did not know "that the acceptance of the guilty plea was contingent on accepting full criminal responsibility for a crime." Further, he argues that his right to due process was undermined for a host of reasons and that the destruction of material evidence was prejudicial to his "defense of innocence." We will not address these issues because they were raised for the first time in this appeal and no explanation
(continued...)

that the post-conviction court properly dismissed the petition because it did not present a colorable claim.

Review of a post-conviction court's summary dismissal of a petition for post-conviction relief presents a question of law this Court reviews de novo. See Arnold v. State, 143 S.W.3d 784, 786 (Tenn. 2004) (citing Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002)); see also Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001).

Tennessee Code Annotated section 40-30-106(d) sets out certain requirements for petitions for post-conviction relief and permits a post-conviction court to dismiss inadequate petitions or allow pro se petitioners an opportunity to amend:

The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

Tenn. Code Ann. § 40-30-106(d).

The Rules of the Tennessee Supreme Court clarify that a post-conviction court's first obligation upon receipt of a petition is to review it in order to determine whether it states a colorable claim and, if so, to issue a preliminary order that, among other things, appoints counsel for indigent petitioners and sets a deadline for the filing of an amended petition. See Tenn. Sup. Ct. R. 28, § 6(B)(2)-(3). Accordingly, whether it is appropriate for a trial court to summarily dismiss a petition for post-conviction relief without allowing a petitioner the opportunity to amend or appointing counsel depends on whether the petition states a colorable claim. See id.; see also Arnold, 143 S.W.3d at 786–87.

Whether a petition states a colorable claim depends on the facts alleged. See Arnold, 143 S.W.3d at 786; Burnett, 92 S.W.3d 403, 406–07. “A colorable claim is one ‘that, if taken as true, in the light most favorable to the petitioner, would entitle the petitioner to relief under the Post-Conviction Procedure Act.’” Arnold, 143 S.W.3d at 786 (quoting Tenn. Sup. Ct. R. 28, § 2(H)). As such, “if the facts alleged, taken as true, fail to show that the petitioner is entitled to relief,

¹(...continued)

was provided as to why they were not presented to the court below. Consequently, these new issues are waived. See Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004) (explaining that issues raised for the first time on appeal in a post-conviction action are generally considered waived) (citing State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996)) (other citations omitted).

or in other words, fail to state a colorable claim, the petition shall be dismissed.” Burnett, 92 S.W.3d at 406 (citing Tenn. Code Ann. § 40-30-206(f) (1997)). In addition, in determining whether a colorable claim has been presented, “pro se petitions are to be ‘held to less stringent standards than formal pleadings drafted by lawyers.’” Gable v. State, 836 S.W.2d 558, 559-60 (Tenn. 1992) (quoting Swanson v. State, 749 S.W.2d 731, 734 (Tenn.1988)).

The Petitioner’s conviction in this case is based on his guilty plea to the offense he now challenges. And, while pleading guilty to the offenses, he had the following exchange with the trial court:

[Trial court]: Are you pleading guilty because you are in fact guilty?

[Petitioner]: Yes, sir.

[Trial court]: Tell me what you did.

[Petitioner]: On one occasion, I was involved in a traffic stop, which I, at the time, had some drugs on me.

[Trial court]: Cocaine?

[Petitioner]: Yes, sir.

[Trial court]: All right.

[Petitioner]: And on the second offense, I had—

[Trial court]: How much cocaine did you have?

[Petitioner]: 2.1 grams.

[Trial court]: All right.

[Petitioner]: And on the second occasion, I sold some drugs to a cop who was an informant, sir.

[Trial court]: All right. Do you still wish to enter this plea?

[Petitioner]: Yes, sir.

Also during his guilty plea submission colloquy, he acknowledged that he understood that if he proceeded to trial, the State would have to prove to a jury that he was guilty beyond a reasonable doubt before he could be convicted. Subsequently, in his post-conviction petition he

alleged that he asked trial counsel to have tests conducted to determine whether the substance he sold to the undercover officer was cocaine, and that trial counsel did not do so. He alleged that he was “coerced” into his plea of guilty even though he had asked his attorney to have the alleged drug tested or obtain a copy of any test results that were in the State’s possession. However, he did not allege that the substance was not cocaine; he only alleges that it was not tested.

We must construe the petition in the light most favorable to the Petitioner. See Arnold, 143 S.W.3d at 786-87. In our view, the post-conviction court erred by summarily dismissing the petition for post-conviction relief. The petition inartfully alleges that the Petitioner asked his attorney to obtain whatever evidence the State had to establish that the alleged drugs in case number 07-0145 were indeed cocaine. He alleges that he was coerced into pleading guilty without the State having to disclose the results of any test demonstrating that the substance he sold was cocaine. Although it is not specifically alleged, we conclude that the petition must be construed to allege that counsel was ineffective by “coercing” him to enter a plea of guilty without adequate investigation to determine whether the State’s proof could establish his guilt.

Because we conclude that the petition stated a colorable claim, we conclude that the post-conviction court erred by summarily dismissing the petition without appointing counsel and allowing the Petitioner to amend his petition should he desire to do so with the assistance of counsel.

Conclusion

Based on the foregoing authorities and reasoning, we reverse the post-conviction court’s order of summary dismissal of the Petitioner’s petition for post-conviction relief. We remand this case to the trial court for further proceedings.

DAVID H. WELLES, JUDGE